EXHIBIT B

***In re Tritek Int'l Inc.*, No. 23-10520 (TMH)**
Transcript of Hearing dated Oct. 6, 2023

UNITED STATES BANKRUPTCY COURT

DISTRICT OF DELAWARE

In re:	:	
	:	Chapter 11
TRITEK INTERNATIONAL INC.,	:	Case No. 23-10520 (TMH)
et al.,	:	(Jointly Administered)
Debtors.	:	
_____	:	

United States Bankruptcy Court

824 North Market Street

Wilmington, Delaware

October 5, 2023

11:03 a.m. - 1:20 p.m.

B E F O R E :

HON THOMAS M. HORAN

U.S. BANKRUPTCY JUDGE

ECRO OPERATOR: JERMAINE COOPER

HEARING re Debtors' Objection to the Proof of Claim of Headwaters Development, LLC [Docket No. 365 - filed August 17, 2023]

HEARING re Motion of Headwaters Development, LLC Pursuant to Bankruptcy Rule 3018(a) for Estimation and Temporary Allowance of Claims for Purposes of Voting to Accept or Reject the Plan [Docket No. 450- filed September 13, 2023]

HEARING re Motion of Debtors for Entry of an Order (I) Approving the Combined Disclosure Statement and Joint Chapter 11 Plan on an Interim Basis for Solicitation Purposes Only; (II) Establishing the Solicitation and Tabulation Procedures; (III) Approving the Form of Ballots and Solicitation Materials; (IV) Establishing the Plan Confirmation Schedule; and (V) Granting Related Relief [Docket No. 297 - filed July 20, 2023]

HEARING re Debtors' Motion for Entry of an Order Authorizing the Debtors to Exceed the Page Limit Requirement for the Debtors' Memorandum of Law in Support of an Order Confirming the Second Amended Joint Plan of Debtors Under Chapter 11 of the Bankruptcy Code [Docket No. 483 - filed October 2, 2023]

Transcribed by: Sonya Ledanski Hyde

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P R O C E E D I N G S

CLERK: All rise.

THE COURT: Please be seated. Hello, Ms. Good.

MS. GOOD: Good morning, Your Honor. Katie Good, Potter Anderson & Corroon, on behalf of Tritek International and its affiliated debtors and debtors in possession. We are here today with one item going forward on our agenda, Item Number 3, Confirmation of the Debtor's Combined Disclosure Statement and Plan of Liquidation.

I'm joined in the courtroom today by my co-counsel Jerry Hall, Michael Comerford and Allison Yager of Katten Muchin & Rosenman, our witness, Brian Koluch, PricewaterhouseCoopers, and my colleague Maria Kotsiras.

We know Your Honor was on the bench all day yesterday and into the evening. So, without stealing too much of Mr. Hall's thunder, I am pleased to report that we have narrowed the issues significantly -- very significantly from the last time we were before Your Honor on the disclosure statement hearing in August, and even more since the filings that we made on Monday. I believe we really only have one remaining contested item.

So, with that, I'll turn the podium over to Mr. Hall to give the Court a further update on the settlements that we've reached, the remaining open issues and walk through the initial presentation.

THE COURT: Great. Thank you, Ms. Good. Mr. Hall, good to see you. Good morning.

MR. HALL: Good morning, Your Honor. Jerry Hall, Katten Muchin Rosenman, for the debtors. As Ms. Good said, we're here today seeking confirmation of the plan and final approval of the disclosure statement, for which the Court gave provisional approval back in August. And also, as Ms. Good said, we are pleased to be here seeking confirmation of a nearly fully consensual -- there is one outstanding issue that will be argued in actions -- Good will argue it for the debtors, and that is the third party release issue, which I mentioned Your Honor anticipated. But every other matter outstanding, all objections have been resolved. I'm just going to walk very quickly through that.

We're, again, super-happy that this happened. We basically have two significant settlements to report in addition to the resolution of sort of one-off objections. The two significant settlements, one of which already happened, was the settlement that Your Honor approved back in August between the committee, Compeer and the debtors, Compeer being the secured lender in this case. That sort of set up the foundation for us to move forward to a plan.

The second settlement which really has come together fully and finally in the past, say, ten minutes, but as a practical matter came together last Friday, and

that settlement has sort of three interdependent components. The first is the committee is now supporting the plan. They have not filed an objection and they are not going to object. They are actually supporting the plan including the debtor's release of claims against the directors and officers. In exchange, the committee is going to receive $500,000 for the benefit of general unsecured creditors and a professional fee concession, all of which is already reflected in the plan. The professional fee concession is among Dechert, Katten and PWC. And this is just a way of ensuring that we remain under the professional fee cap, which was part of the Compeer creditor committee stipulation back in August.

Additionally, the committee's going to be the beneficiary of the Strobel settlement, which, when the time comes, Your Honor, I'm going to ask to introduce the Strobel settlement into evidence along with the declarations that we filed thus far. And that settlement creates significant value to the estate and it involves contributions from non-debtors, specifically, High Life, which is sort of a grandparent of the debtors, is going to be paying Strobel approximately $730,000. And just to be clear, I'm approximating. I don't want my words to be misinterpreted. The documents will govern.

But Strobel will also be pursuing a PASA claim,

which they had previously filed. In exchange, Strobel is supporting the plan by changing its vote from reject to accept. They are opting into, if you will, the third-party releases. And perhaps most significantly for the committee deal that we struck, they've agreed to waive distribution participation. And because of the collective deal of all the parties, we estimate that Strobel's waiver will be worth something in the neighborhood of $850,000, maybe $900,000, in actual distributed funds to the remaining creditors.

And then, finally, the debtors and Headwaters had been engaged in some motions and objections practice. We have resolved all of that. The most significant upside to that result is probably avoiding spending substantial professional fees litigating, and taking evidence, and discovery and what have you over those issues.

And so, again, we're super-pleased. This is a great result for the case. That's not to say that people aren't disappointed. This is by no means a full-pay case. but that being said, 11-14 percent, which is what we're projecting for general unsecured creditors is a far cry better than the outcomes that we would've faced if we had to finish our discovery with the committee, pursue a contested plan -- assuming that would even get confirmed, the distributions would be much lower. And, for what it's worth, obviously, in our view, much better than a

liquidation, which the liquidation analysis that we've already filed as a claim supplement supports.

So, again, largely uncontested relief. I want to thank the lenders, and the committee, and everyone else that was involved in getting us here. It was a lot of creativity, very constructive engagements even when people were at their most stressed and maybe short tethers.

As we noted in the agenda, we did receive a formal objection from the United States Trustee's Office. That remains unresolved as to the one piece, which is the third party it releases. It is resolved as to exculpation and the debtors, the estate releases. We also received a formal objection from creditor Dakota Plains. That is also resolved. They will not be pressing that objection.

We received an objection from the Fire Group, which we resolved by adding language to the plan, which is already on file. And then we also received informal comments from the Texas controller and we incorporated language into the plan. And my colleague, Mr. Comerford, will walk through the plan and the confirmation order, specifically the changes, to bring Your Honor more fully up to speed. I'm just giving you the overview. All these modifications were of negligible impact on other parties. Specifically, no financial -- direct financial impact on creditors.

So, with that, Your Honor, I'd like to move admission of a couple of declarations, five of them exactly, and the Strobel settlement document, which was signed yesterday, I believe.

THE COURT: Okay.

MR. HALL: So, as to the declarations, we have two declarations of Brian Koluch of PWC and those were filed at Dockets 486 and 495, and those were in support of the plan.

THE COURT: Okay, you're moving those in? Okay.

MR. HALL: Please, Your Honor.

THE COURT: Okay, okay. Does anybody objection to the admission of Mr. Koluch's declarations? Okay, I hear no response. Does anybody wish to cross-examine Mr. Koluch?

MS. SARKESSIAN: Your Honor, if I may just make a statement?

THE COURT: Yes, of course. Good morning, Ms. Sarkessian.

MS. SARKESSIAN: Good morning, Your Honor. How are you this morning?

THE COURT: Very well. Thank you.

MS. SARKESSIAN: I think this is the first time I'm before Your Honor. It's a pleasure.

THE COURT: It is. It's good to see you.

MS. SARKESSIAN: It may be the last because I'm retiring soon.

THE COURT: So I hear.

MS. SARKESSIAN: And hopefully we'll make this a good one. I rise just to state that we have resolved the issue of the debtor releases, which is what I view these declarations to be -- it's not the only thing, of course, but as far as the items that the U.S. Trustee objected to. There's more towards the debtor releases. I understand from debtor's counsel that if Your Honor determines that the third party releases in this case are not consensual, that they are not going to argue that they meet the requirements of continental and can be approved in that manner.

And I bring that up because if they were going to pursue that, there may be some information in these declarations that would be relevant to that issue. But I don't believe there's anything in the declarations that are relevant to whether or not these releases are consensual. It's really a legal argument. So, for that reason I'm not -- won't be cross-examining the witness. But if for some reason the debtors change their mind and they're going to pursue non-consensual third-party releases, then of course I would reserve my right to cross-examine the witness at that time.

THE COURT: Understood. And that's just fine. I appreciate that.

MS. SARKESSIAN: Okay, thank you, Your Honor.

THE COURT: Okay, well, with that, Mr. Koluch's declarations are admitted.

(Mr. Koluch's Declarations Admitted into Evidence)

MR. HALL: Thank you, Your Honor. Mr. Mannal will tell you I change my mind all the time but not on this. We are not going to be coming back to make the argument that Ms. Sarkessian raised.

THE COURT: Okay.

MR. HALL: I'd also like to introduce Mr. Lazaruk's declaration. That's at Docket Number 480 also in support of the plan.

THE COURT: Does anybody object to the admission of Mr. Lazaruk's declaration?

MR. HALL: It'll be the same circumstances for the U.S. Trustee, I believe, and we will acknowledge we're not going to be arguing that. We satisfy nonconsensual standards.

MS. SARKESSIAN: That actually wasn't a point.

MR. HALL: Oh, sorry, sorry. That's right. He is not present today to be cross-examined. He's actually up in Winnipeg. But I understand that nobody intends to cross-examine him so hopefully that won't be an issue.

THE COURT: Okay. I'll ask the question again. Does anybody object to the admission of Mr. Lazaruk's declaration? Okay, I hear no response. It is admitted.

(Mr. Lazaruk's Declaration Admitted into Evidence)

THE COURT: Does anybody wish to cross-examine Mr. Lazaruk? Okay. No response, which is good news.

MR. HALL: And then, lastly, Your Honor, we have John Burlacu -- and I may be mispronouncing the last name -- of Donlin Recano. He has two declarations, one of which was the original for voting tabulation purposes and the other was to disclose nonvoting parties who also opted out of the releases. That was at the request of the U.S. Trustee. Those are at Docket Numbers 479 and 490.

THE COURT: Okay. Does anybody object to the admission of Mr. Burlacu's declarations? Okay, I hear no response. The declarations are admitted.

(Mr. Burlacu's Declarations Admitted into Evidence)

THE COURT: Does anybody wish to cross-examine Mr. Burlacu? Okay, there's no response.

MR. HALL: Okay. And then, lastly, from an evidentiary standpoint, Your Honor, I have copies of the settlement that the debtors and others reached with Strobel parties. And if I may, I will bring one up for the law clerk and for yourself and then distribute to whoever else wants them.

THE COURT: Okay. My law clerk is actually sitting in the gallery so I'm just going to ask him to go up

to the rail and grab a copy of that for me, please.

MR. HALL: Thank you. And, Your Honor, if I may approach?

THE COURT: Yes, please do.

MR. HALL: And, Your Honor, relevant for our purposes today, or at least primarily relevant, are Paragraphs 9 and 10 on Page 7 of the Strobel document. But in any event, Your Honor, I'd like to offer this into admission. It is a piece -- it is, you know, the formal piece of support for the plan overall and the settlement that we reached with the committee that enables us to go forward on this basis. And there are a couple left over if anybody wants. But these reflect that the Strobel parties are agreeing to support the plan, change their vote to yes and waive distribution in the Class 4 General Unsecured Class.

THE COURT: Okay. Does anybody object to the admission of the document entitled Cash Settlement Agreement and Mutual Global Release Among the Strobel Parties, the High Life Parties and Patrick (indiscernible)? Okay, I hear no response, it is admitted.

(Cash Settlement Agreement Admitted into Evidence)

MR. HALL: Thank you, Your Honor. I think to round out the record, Your Honor, we filed a plan supplement, two iterations, one at Docket Number 458 and one

at Docket Number 481. This provides, among other things, the liquidating trust agreement. It designates Matthew Dundin as liquidating trustee and sets forth retained causes of action and the wind-down budget. The liquidation analysis that we included with the plan shows that the plan satisfies the Best Interest of Creditors Test. It's also supported by Mr. Koluch's two declarations. The global settlement, also described in the Koluch declaration, and the fourth amended plan provides the funding necessary to satisfy funding and feasibility under the plan. There would be no obligation for the level of funding provided in the plan if such claims were asserted in connection with a Chapter 7 liquidation.

As reflected in the voting declaration, now submitted into evidence, Donlin Recano sent solicitation packages and ballots in accordance with the Court's order. Pursuant to the Court's order, the voting deadline and deadline to object were set at September 28th. And as Your Honor has probably seen in the voting declaration, the impaired classes that were entitled to vote, which are Classes 3 and 4, overwhelmingly voted to accept the plan.

And I'm happy to walk through, Your Honor, if you would like, the 1123-1129 factors. But given that there's no issue concerning them, no objections related to them and the briefing and declarations fully and obviously support

them, I would propose to the Court that I not do that and spare everybody, including the Court, the time it would take to do so.

THE COURT: Yeah, I think those issues were adequately briefed. I just do have one question for you.

MR. HALL: Yes, Your Honor?

THE COURT: The Dakota Plains objection did raise the 1129(a)(7) issue but you say that that's been resolved?

MR. HALL: That is correct, Your Honor.

THE COURT: Are you able to share what the nature of the resolution was?

MR. HALL: Oh, absolutely, Your Honor. They are standing down from the objection. There was no accommodation. Basically, we explained to them what our argument would be and that, in our view -- and I think Mr. Comerford did this persuasively -- that they would actually be worse off if they were to press the objection and prevail. So, they took that back internally and caucused and determined that they agreed with it and are, for that reason, standing down.

THE COURT: Fine. That's great. Thank you. So, yes, no need to go through argument on those two Code sections.

MR. HALL: Perfect, Your Honor. Then with that, what I would say is we have maybe two sort of sections left,

neither of which is going to be. The first is the argument on third party releases. And what I would propose is allow the U.S. Trustee to argue first since the issues have already been briefed and the Court understands these issues very, very well. So, instead of having three rounds of argument, just two. The U.S. Trustee can have the first word, we'll take the last. And then after that, Mr. Comerford will walk the Court through both the plan and the confirmation order so that Your Honor has all of the current changes, some of which are not reflected on the docket already.

THE COURT: Okay. Thank you, Mr. Hall.

MR. HALL: Thank you, Your Honor.

MS. SARKESSIAN: Again, Your Honor, for the record, Juliet Sarkessian on behalf of the U.S. Trustee. Your Honor, just so you know, this is water, not coffee. I say that because I think it would be rude for me to be drinking coffee up here but I do need to occasionally sip some water.

So, Your Honor, so there were three items. There are a few provisions in the plan that the U.S. Trustee had objected to: Third party releases, which is releases by non-debtors in favor of other non-debtors; there's the debtor releases and the exculpations. The debtors have made changes to the plan that resolve our issue with respect to

the debtor releases and the same with respect to exculpation. There's one additional small change -- cleanup change, I guess, that needs to be made. I understand that will be done before it's submitted.

MR. HALL: It will, Your Honor.

THE COURT: Okay.

MS. SARKESSIAN: So, those two issues are resolved and we are left with the third party release issue. So, the plan extinguishes direct claims that creditors and administrative claimants hold against non-debtor parties without the affirmative consent of the party supposedly giving the release. These are not derivative claims. Any claims that a creditor holds against non-debtor parties that are derivative of the debtors are already being released through the debtor release provision. So, you don't need a third party release for that. The third party release really covers -- I mean, yes, it also covers derivative claims but that's already being separately released by the debtors. So, it's really only relevant to direct claims they may have against the numerous non-debtor parties.

And the released parties here are -- it does include the debtors and the estates. That's one for the released parties. The prepetition agent and the prepetition lenders, the DIP lender, the committee and each of its members, the liquidating trustee, who is not yet appointed,

and then all of the related parties of all of those parties that I just mentioned.

And I think it's worth noting that the claims against the -- the claims that any creditors would hold against the prepetition lenders are governed by the DIP financing order. And somebody can correct me if I'm wrong but I believe the period to object to those claims has expired. So, again, I don't know that any further release is needed in that regard.

With respect to the liquidating trustee being a released party, the release only goes through the effective date of the plan. So, they're not even appointed until the effective date, so that release to me seems to be meaningless. With respect to the release of the committee, and their members, and their professionals, well, they're all getting exculpations so -- in which the Third Circuit in PWS said that's what they're entitled to. And then, of course, you have related parties that would include, for example, the professionals of the debtors who, again, are already entitled to exculpation and that is the only thing they're entitled to.

A release of claims is a significant action. Outside of the world of bankruptcy, releases are almost always documented in writing that is signed by the person or entity that's giving the release. Releases are not implied

by silence in response to something sent by mail that may or may not have reached the destination, may or may not have gotten to them on time, for which the recipient may or may not have understood. And as far as understanding the releases, Your Honor, if you look at the third party release, it's comprised of two paragraphs: Each paragraph is one very long sentence. The first paragraph is one sentence that's 17 lines and the second paragraph is one sentence that's 12 lines. It is dense legalese even for lawyers to read through it, even for bankruptcy lawyers to read through it.

And then embedded in those provisions, those two paragraphs, are numerous defined terms including the defined term of releasing party, which is actually quite complicated, and the defined term of released parties. And then those defined terms, in turn, embed other defined terms such as related parties. So, it's sort of a set of interlocking boxes that, you know -- frankly, if you have a creditor who is an individual person, who's not a lawyer, or it's a small business, understanding these complicated provisions would not be easy and they may not have the means to pay a lawyer to read this and explain it to them.

And while creditors I think -- as a general proposition, people in the United States understand that hey, if a company files for bankruptcy or a person files for

bankruptcy and they owe you money, you're going to get maybe something less than what you're owed at some point in time and then after that, you're not going to be able to sue that person or entity anymore because they're going to get a discharge or some other similar relief through the bankruptcy.

What I think most people would never think of is that through that bankruptcy process their direct claims against others that have not filed for bankruptcy are somehow going to be released. That is not what people -- you know, when you think about bankruptcy, that's not the purpose of bankruptcy, right? The purpose of bankruptcy is for the debtor to get a discharge. And I mean, this is assuming you understand anything about bankruptcy at all.

So, the idea that if a ballot does not get returned -- you know, a ballot is sent out, a solicitation is sent out in a package to a general unsecured creditor, it's not returned, that that somehow means that they have consented. That they got the package, that they got it timely, that they read it, that they understood it or they had the means to pay a lawyer to explain it to them and they therefore could say, oh, you know what? I'm either going to vote or not vote and I'm going to check the opt out box and send it back and make sure that, you know, I send it by FedEx so that it gets to the claims agent (indiscernible)

with no chance that on the way back in the mail it somehow gets delayed. You know, that is not possibly the reality for many people.

Now, if you look at the balloting report, the balloting agent received 34 ballots from the general unsecured creditors. I understand from committee counsel that there are approximately 400 general unsecured creditors in these cases. Now, the balloting report did show that 12 of these solicitation packages came back as undeliverable. So, if you subtract that out and you subtract out the 34 ballots that received it, that means there's 354 general unsecured creditors that did not send in a ballot. And under the opt out process that's being proposed in the plan, they have all consented -- they were deemed to consent to release direct claims against non-debtor parties.

Now, the other group of creditors that are affected are unimpaired -- you have unimpaired creditors in Classes 1 and 2. So, you have classified unimpaired creditors, which are secured creditors other -- Class 1 I think is secured creditors other than the prepetition lenders; Class 2 is nontax priority claims. So, they too would have their direct claims against non-debtors stripped from the plan. And these claims that are covered by the release are far broader than the claim on which they are unimpaired and going to be paid in full.

Then you also have unimpaired claimants who are unclassified, so the admins and the priority tax. We have all the same issues with them but with the additional issue that they did not get any way to opt out. So, the -- I'm sorry, I should've mentioned the classified Classes 1 and 2 creditors, when they received their notice, it did have a box they could check to opt out and send it back. But that was -- and I got confirmation from the debtors -- that was not sent to admin creditors or priority tax, so they didn't even have that ability to do that.

And, by the way, I mean, as we all know, the Code provides that in order to get a plan confirmed, administrative creditors and priority tax have to be paid in full. So, it's not like they're getting any additional consideration for giving these releases to non-debtors. By being paid in full, they have to be paid in full or there's no plan to confirm. So, it's not like they're getting an extra gift of any kind.

THE COURT: But if the releases that they're proposing to grant are releases only in connection with the Chapter 11 cases and they've been paid in full, then what other additional damages might they have?

MS. SARKESSIAN: So, it's not -- it's any claim that has any connection to the debtor. And the way that it's written is, you know, any claim that has any connection

to the debtor, comma, the Chapter 11 cases, comma, the plan process, comma. You start -- stop at connection to the debtor, that is a full phrase. So, the example that we gave in the objection was -- so you have a taxing authority, okay? And you could have a situation in which they go after a released -- a party that is released under the pan, and they had income that they derived from transactions with the debtor. Well, they could -- I mean, technically, under the way that the plan is written, they could argue taxing authority, you have released us from any claims that had any connection to the debtor. And this has a connection to the debtor. We got income, we did business, we got money from the debtor. This is a release from anything up through the effective date.

Another example would be an employee. An employee who says -- because employees of the debtor are released parties as well -- I don't have to pay tax on my salary from the debtor, I got a release. You could have a secured creditor who is unimpaired because they're -- now we're going to classified route -- a secured creditor who's unimpaired because they're getting their collateral back. But say they have a deficiency claim, and say they have a guarantee from a non-debtor affiliate to pay the full amount. They're releasing that.

So, again, because it's so broad -- if it was

limited to you're releasing any claims against the released parties for the claim upon which you're being paid in full, that'd be another story. But that's not it. It's very, very broad. It just has to have any connection whatsoever to the debtor, and that's the issue with the unimpaired creditors.

And, in addition, with respect to the admin creditors and the priority tax, they don't even get the form where they can check a box or return it. Now, the debtors say well, they can "opt out by filing an objection." In this district that's not what opt out means. Opt out means you get a form, it's relatively -- you have to understand it, but if you understand it, you check a box and you mail it back. That's a lot different than retaining counsel, paying counsel, they have to file an objection, they have to show up in court to argue the objection. But that's not -- the right to object is not an -- I'm using air quotes here -- opt out. It's not. So that was -- at the very least they should've gotten that but, of course, again, the U.S. Trustee's position is that everything should be an opt in when you're talking about releasing non-debtor parties.

In the brief that the debtors filed, they talked about the mail rule. The mail, M-A-I-L. That if something is sent in the mail that it's reasonable to expect that it gets to the intended recipient and I guess does so timely.

Although I think the timely element when COVID started, started to get a little bit different than what it was prior to COVID and that continues to potentially be a problem. But one of the things they argue is that well, if somebody later on -- if it turns out that in at some point in the future -- and, by the way, this is likely how it would happen. You would have a party who's defined as a releasing party who sues one of the non-debtor parties who's a released party, and that party -- they'll be in state court or in federal court, non-bankruptcy court, right, because it's a claim of a non-debtor against a non-debtor. And that non-debtor says -- picks up the plan, you released me. And then the response would be I never got that solicitation package. It never came to me.

So, the debtor's view is well, that's their burden to prove that they'd never received the package. Well, I don't know how you prove a negative. And that's a pretty high burden of proof to avoid a non-debtor giving a release of their direct claims against another on-debtor. I mean, to have to prove -- I don't know how you prove that.

And, by the way, even if you did prove it, the plan doesn't even make that an exception. I mean, it doesn't say, but if the person can prove they didn't receive it, then they didn't give a release. But I don't know how you prove that.

Now, it is true that the definition of releasing party does have an objection if a solicitation package was sent out and it was returned to the debtor or their agent and it said, you know, wrong address -- we ask for them to do that at the disclosure statement stage. They did do that and we are thankful. That's a good first step. But that doesn't cover every way that -- that doesn't cover every situation.

So, I'll give you an example. This morning, I left my house. On my porch, the table on my porch is sitting a package. It is not addressed to me and the address is not my address; it's my next door neighbor's address, so that's not too bad. I'll take that -- I didn't do it this morning -- I'll take that package over to her. I've gotten mail from people who live further down the street, blocks away. I'm like, why is this even being delivered to me? And, by the way, I love my postal -- she's wonderful but something gets caught in the bottom of another letter or whatever, who knows why? I get things all the time. And I say to myself -- I mean, that's not something -- that's not going to be returned to them. It may very well have been addressed correctly, it's just not my address. It was delivered incorrectly.

And I say, I'm going to go take that. The next time I go down the street, I'll drop that up. And then more

mail comes in and it goes on top, and maybe I do and maybe I don't. When that happens at a business, I don't know what happens. When a business gets mail that's addressed to someplace else with a different address, there's no way -- there's so many unknowns. So, just because a package doesn't get returned back does not mean that it actually got to the intended recipient or that it got to the intended recipient timely. And that's the beautiful of affirmative consent, is you know they got it, they saw it, they understood and they're agreeing to it.

Now, talking a minute about the case law, from the -- when you look at the Third Circuit, there's actually no case from the Third Circuit that addresses what constitutes consent. We have Continental, we have Millennial Labs, we have Global Industries Tech from the Third Circuit that talk about situations where there was no opt in, no opt out, nothing. It was -- you know, I think everybody would agree -- a nonconsensual release. Continental actually doesn't say that that would ever be okay but it gives examples of well, this might be okay if there's consideration or if it's fair, etc. So, there's no guidance from the Third Circuit, as Your Honor knows.

In our district, as I'm sure Your Honor's also aware, Judge Walrath and Judge Owens require affirmative consent for the release of direct claims against non-

debtors. We are hoping to persuade you to join their view. We do understand that that is a minority view I this district. There are also, of course, cases which we cited from other districts that take the same view. And of course there's Judge Walrath's Washington Mutual decision where she makes it clear, you know, affirmative consent, that is not just opting out. Opting out of a third party, but that does not show whether or not somebody consents. And she says, "Opt out mechanism is not sufficient to support the third party releases, particularly with respect to parties who do not return a ballot or who are not entitled to vote in the first place," which are the two situations that we are addressing here.

And Judge Walrath's ruling since then has been consistent with that view of acquiring affirmative consent. The exception she makes is if you vote in favor of the plan, then it's okay to make it an opt out -- for that be to an opt out. Though I think she recently said, it would be better if it was an opt in. I think she's open to that.

Now, of course, Judge Owens' decision in Emerge, the Court ruled similarly that a consented third party release, "cannot be inferred by the failure of a creditor or equity-holder to return a ballot or an opt out form." And she reached this conclusion even though the Court acknowledged that the opt out forms provided conspicuous

notice of how to opt out and the consequences of not doing so. But the Court rejected the debtor's argument that inferring consent from silence should be approved as typical, customary or routine.

And Judge Owens said that failure to return an opt out notice or a ballot could be due to "carelessness, inattentiveness or mistake" rather than constituting a manifestation of intent to give a third party release. And then, of course, it could also be caused by the examples I gave: Not getting the solicitation package or the opt out form; not getting it on time; getting it, not understanding it and not having the means to retain counsel.

Now, the debtors point out that Judge Owens has, in some more recent cases, allowed opt outs to be used but that has only been with respect to those who actually return a ballot. So, the issue was if somebody votes to reject the plan, do they also have to check the opt out box? And I believe she does have a few rulings, bench rulings, that allowed that. But they did not allow saying, oh, if you don't get a ballot -- if a ballot doesn't come in at all, we're going to assume that person consents. And also, same thing for unimpaired parties. If they're unimpaired, they don't get a ballot. She has not changed her view on that, to my knowledge, and I try to track these decisions very closely.

And, in fact, in the case of Ketner, which is 20-12366, the judge, Judge Owens' rule on February 15, 2022 that there it was -- specifically she addressed unimpaired creditors and said that releases cannot be imposed on them without their affirmative consent. That is -- transcript is at Docket 298, Pages 50-54.

I also want to mention, Your Honor, that the issue about those who vote to reject whether them checking -- they can be required to check an opt out box, that's actually not an issue here because of the way that it's written. If you reject the plan, you're not getting third party releases, which we appreciate. This is -- I mean, you know, there were a lot of changes made at the disclosure statement stage that made this better than -- this is not the worst by far that we've seen at this point. I mean, they definitely tried to make some accommodations but you still have, again, those two groups, especially those who are not returning ballots at all, that were still deemed to be consenting to releases.

Another -- I'm not sure that I'd say this was an argument in the brief but the debtors referenced Section 1141 of the Code and I did want to address that 1141(a) of the Code, which states that the provisions of a confirmed plan bind the debtors any entity acquiring property under the plan, any creditor, equity security holder or general

partner of the debtors. This provision does not address what can be included in a plan; it addresses the effect of a plan being concerned. The debtor -- and I bring this up, Your Honor, because I've heard this sort of argument before -- is well, a debtor put something in the plan. If it's confirmed, that's it. A debtor can't just put anything in a plan and say, oh, 1141, if it gets confirmed it's enforceable.

And an example of that, which the Third Circuit dealt with, was a plan cannot be enforced if, for example, it treats property that does not belong to the debtor as property of the estate. And that was the situation the Third Circuit addressed in First Fidelity Bank v. McAteer, 985 F.2d, 114 from 1993. I did not cite that in our objection. In fact, the debtor cited it and I thank the debtor for citing that case in their objection. They cited it as supporting the following proposition: "Other courts have held that for a release to be consensual, the creditor must have unambiguously manifested consent to the release for the non-debtor from liability on its debt."

Now, that was a quote from another case. Arrow? Arrow something. But they then cited that First Fidelity Bank is supporting that view. So, I'm going to talk a little bit about that case because I did not address it. I will be doing so in future objections but I did not address

that. That was a Chapter 13 case. So, the debtor purchased a truck through an installment contract that was assigned to a bank. And then the debtor purchased an insurance policy naming the bank as the primary beneficiary. And then the debtors -- his estate -- this is before filing for bankruptcy -- the estate as secondary. And then the policy provided that if the debtor died, the insurance company would pay the bank back any amount remaining on this installment car loan.

Then this individual and his wife filed for Chapter 13. And then the bank's claim was crammed down to the fair market value of the collateral plus 20 percent of the unsecured balance. And the bank did not object to the plan.

After the plan was confirmed, the debtor -- the husband died. The insurance company paid the bank the amount that was due under the policy and then the wife moved in the Bankruptcy Court to compel the bank to turn over to the estate the insurance proceeds in excess of the amount that was due to the bank under the confirmed plan. The Bankruptcy Court granted the request. The District Court affirmed, the Third Circuit reversed.

The Court indicated that to support its position, the debtor relies on 11 USC 1337(a) which provides that "the provisions of a confirmed plan bind the debtor and each

creditor." I quote this because this language is quite similar to 1141(a). The Third Circuit then went on to say, "While it is true that the Bankruptcy Court's confirmation of the plan binds the debtor and all creditors vis-à-vis the debtor, it does not follow that a discharge in bankruptcy alters the rights of a creditor to collect from third parties. Section 524(e) specifically limits the effect of a discharge. It provides that discharge of a debt -- of the debtor does not affect the liability of any other entity on, or the property of any other entity for such debtor."

At the end of the opinion, the Third Circuit summed up its ruling, and this is a quote but I'm going to substitute like, the bank and the debtor instead of the proper names. "The bank's interest in the proceeds of a life insurance policy is not the property of the debtor's estate and thus cannot be altered by confirmation of the Chapter 13 plan. The confirmation of the debtor's Chapter 13 plan did not work to erase or alter the bank's rights as a third party beneficiary to collect from the insurance company."

So, that's all to say you can't just put something in the plan and say 1141, got you. It's got to be consistent with the Code and the bankruptcy rules. And I think also relevant is the Third Circuit's opinion in PWS Holdings, 228 F.3d, 224 from 2000. "Section 524(e) makes it

clear that a discharge in bankruptcy does not extinguish claims by third parties against guarantors or directors and officers of the debtor for the debt discharged in bankruptcy."

And you can take that a step farther and say, well, if it doesn't let you do it for the debt discharged in bankruptcy, surely it doesn't allow you to extinguish claims that weren't addressed in the bankruptcy -- claims that had any connection to the debtor. So this, you know -- the plan goes further than what the Court's talking about here to extinguish claims that were not even -- potentially not even addressed at all in the Bankruptcy Court because of the very wide definition of what is a released claim.

So, Your Honor, since the debtors have indicated that they are not going to make an argument that if Your Honor finds that the releases are nonconsensual, the plan should not be confirmed under the continental standard, if Your Honor determines that the -- or any portion of the non-debtor releases are not consensual, then the plan cannot be confirmed unless those releases are omitted or somebody wants to reserve parties with an opt in. Of course, that's always a possibility.

That's why we always bring this issue up, Your Honor, at the disclosure statement stage, because we want to make it clear we want to give -- you know, be on notice if

they want to change their minds and say, you know what, let's do it as an opt in, they have that ability because, of course, nobody wants to have to resolicit anything. But here, again, given who is among the released parties, again, prepetition lenders already got a release respectively through the DIP financing order, the committee, their members, the related parties -- the professionals of the committee and the debtor, they're all getting exculpations. So, release is a sort of extra icing on the top, I guess I would say.

THE COURT: Well, is it duplicative? Is it the same thing, effectively, or is it something additional?

MS. SARKESSIAN: So, the only -- I think the only thing that's different is that, of course, exculpations make exceptions for fraud, intentional misconduct, gross negligence. Now, up until last night, the way I read the third party release, there was an exception for known and unknown claims in the third party release of fraud, intentional misconduct, gross negligence or claims that would come out of like, a criminal act. But last night, I realized that it wasn't known and unknown; it's only unknown claims. So, there's an exception for unknown claims but any known -- I made that mistake, I can't even imagine what some creditor would... I mean, I looked at it but sometimes you're so used to seeing known and unknown, your brain puts

it there when it's not there.

So, what would be released would be any known claims of fraud, intentional misconduct, gross negligence or claims arising out of criminal acts of exculpated parties because they're, I think, all or almost all of them would also be a released party. So, that would be the extra. And, again, those are things that exculpated parties are not entitled to under PWS.

So, I think, Your Honor, in summary, the consent of a non-debtor to release their direct claims against other non-debtors needs something more than silence. It needs an affirmative act like an opt in rather than an opt out. And the U.S. Trustee would respectfully request this court to join the view of Judge Walrath and Judge Owens in ruling that affirmative consent is needed in that regard.

Your Honor, unless you have any further questions, my argument is concluded.

THE COURT: No. I appreciate the argument. I don't have any questions at this point.

MS. SARKESSIAN: Thank you.

THE COURT: Thank you.

MS. GOOD: Good afternoon, Your Honor. For the record, Katie Good, Potter Anderson & Corroon. Just to respond briefly to the U.S. Trustee's argument, I know we briefed this issue extensively. The debtor's view is that

these releases are consensual based on precedent in this jurisdiction from Judge Shannon, Indianapolis Downs, Judge Goldblatt in Arsenal Intermediate Holdings, Judge Kerry in Scansion, Judge Dorsey in Mallinckrodt and numerous other eventual links that we cited in our memorandum.

We do acknowledge that there is a split of authority on whether consent can be inferred from the failure to act. One side of that split looks at contract law and says you cannot infer silence to mean consent unless there is a duty to act. That means you can't send a letter out that says, hi, third party, you're going to buy my car for this price unless you get back to me by this date -- if I don't hear from you, I'll assume we have a good contract.

That's not what we're doing here. That's not the factual situation that we're in. We are in the other -- the factual system that the other side of the split notes. We're in an adversarial system of justice of justice in which the judge's primary role is to resolve disputes presented by the parties. In that adversarial system, parties can be bound by their inaction when they receive notice and they fail to act.

As Judge Dorsey noted in Mallinckrodt, there is a duty to speak in the context of court proceedings. In his opinion in Arsenal Intermediate Holdings, Judge Goldblatt started his analysis with the premises (sic) that the

functioning of the bankruptcy system generally depends on requiring parties to object to the relief proposed in the plan and come to court and raise their objections. He goes on to highlight several other situations in bankruptcy proceedings where the failure to act has consequences. Those include default judgments, cure claims, bar dates, consent to entry of final orders by Bankruptcy Courts and there are others outside of the bankruptcy context. Class actions. The failure to raise arguments at a certain point in a proceeding or to plead certain claims at various points in litigation.

So, we would urge the Court to side with the majority here and conclude that where the notice is prominent and conspicuous and parties have a fair opportunity to opt out, that it is fair to have that release be consensual, using the definition of consensual that Judge Goldblatt notes in Arsenal Intermedia Holding, which is it's consensual because no party has objected and no party has opted out.

The U.S. Trustee raises the issue of parties not receiving their mail because it's maybe been mis-delivered. We did eliminate from the releasing parties at the disclosure statement phase, our solicitation procedures hearing phase, any party whose mailing was returned as undeliverable. But the rest of her argument would entirely

gut longstanding precedent of the mailbox rule and undermine the federal rules of procedure, which expressly permit service by mail in many situations. If there are problems with service by mail, those are problems that rulemaking bodies will need to address, not problems that can be solved in the context of this type of dispute.

With respect to the unimpaired claims, those claims who are administrative and priority tax claims did receive a confirmation hearing notice that expressly set forth all of the relevant provisions regarding the releases, including defined terms. It provided a pace where those creditors could go and receive the plan free of charge on the claim's agent website or a number where they could call and receive it if they wanted to review that further. And it told them the procedure that they needed to follow in order to elect not to be a releasing party, and that was to object.

The parties who were unimpaired and who were classified did receive a notice of nonvoting status. Those parties had the ability on that notice to check an opt out box and send it back, and our supplemental voting declaration identifies the parties who did.

I think the example that the U.S. Trustee gives with respect to some of the tax claims that an employee, for example, would not have to pay income tax on wages received

from the debtors stretches the language in the plan a little far. You know, and those taxing authorities regularly receive notices in bankruptcy cases. They follow the docket, they show up at the DIP hearing. We regularly put language in DIP orders to preserve their rights, in sale orders -- we get comments sometimes in the context of confirmation and those parties are not here today. We have not received any objections from them.

We made clear -- I know the U.S. Trustee noted that these are dense documents but we tried to make them as clear as possible. We put the language in bold, we added language to each of the notices and the ballots saying that a failure to -- or that an opt out would not impact a distribution. So, we tried to make this easier to understand for parties. I don't agree with her position that if a creditor -- that a creditor may understand that claims against the debtor are impacted but they may not think about third party claims. This has certainly been an item that is, A, existing, under precedent in this jurisdiction, and has been a topic of news and debate in the larger community, even outside of the bankruptcy community. It's gotten a lot of attention due to numerous mass tort cases.

We also did everything that we could to make returning these opt out forms as easy as possible for

creditors. We made balloting online so creditors could return those ballots online. All the creditors received envelopes that were stamped and ready to go back. So, and I Just want to note before I conclude here that I think Cutter is an entirely different case. That plan did not include a third party release. If it had, that could've been a very different ruling. But because it did not include that, it's very distinguishable from the factual situation that we have here today.

And Judge Goldblatt noted in his decision in Arsenal that if you start with the proposition that the implication of the Third Circuit's suggestion that nonconsensual releases may be authorized in exceptional cases, that consensual third party releases then ought to be noncontroversial. So, here we have made -- we have followed the majority precedent. We have done our best to make these releases clear and conspicuous to creditors and we would urge the Court to follow the majority here and find that the failure to respond and check an opt out box should be implied consent to these releases.

THE COURT: Okay, I do have a question for you, Ms. Good.

MS. GOOD: Yes?

THE COURT: Ms. Sarkessian raised the issue about -- in the third party releases, the scope, and that there is

the exception for gross negligence, willful misconduct, fraud, criminal acts, but only to the extent that those claims are unknown. Why does it not extend to known claim as well?

MS. GOOD: Your Honor, our view is that if creditors know that they have these claims, they should opt out and they should assert them. But if Your Honor were to request that we make that change, we would certainly do so.

THE COURT: Okay. Thank you, MS. Good. Ms. Sarkessian?

MS. SARKESSIAN: Your Honor, can I ask Ms. Good a question?

THE COURT: Sure. Yeah, take a moment.

MS. GOOD: Yes, I think I referred to the wrong case. I said Ketner and I was referring to First Fidelity v. McAtter.

THE COURT: Okay.

MS. GOOD: My bad.

THE COURT: Understood, understood.

MS. GOOD: That was my poor notetaking. Apologies.

THE COURT: That's okay.

MS. GOOD: Thank you.

THE COURT: Thank you for clarifying that for me.

MS. SARKESSIAN: Just one point that -- again, for

the record, Juliet Sarkessian for the U.S. Trustee. Debtor's counsel mentioned there being some discussion in the news about the idea that a bankruptcy case could result in releasing non-debtors. She may be talking about the Purdue case, which, of course, is before the Supreme Court. And as she mentioned, it's a mass tort case. This is not a mass tort case. I think this situation is different. I think people are starting to hear in mass tort cases that these types of things might happen. After the Supreme Court rules, it might be different, but this is not a mass tort case. And that's really my only comment.

THE COURT: Okay, okay. Anything else from the debtors? Good afternoon.

MR. COMERFORD: Good afternoon, Your Honor. Michael Comerford with Katten Muchin & Rosenman. I mean, unless Your Honor would like to go in a different direction, we could walk through the plan and the confirmation order changes at this point obviously subject to however you'd like to proceed.

THE COURT: Yeah, let's walk through the changes, please.

MR. COMERFORD: Okay. So, I have tabbed copies for you, if I can approach?

THE COURT: Okay. That's perfect. Yeah, thanks. Got you, thank you.

MR. COMERFORD: So, I'll say it on the record. So, what I handed up to you, Your Honor, is a redline of the plan and this is on file. It's Docket Number 494. The confirmation order that I'm going to walk you through is marked against what we filed as proposed confirmation order but this version has not been filed yet. If other people would like a copy of it -- if you have copies that we can hand out while I walk through this?

THE COURT: Okay, can we just make sure that Mr. Coleman, my law clerk, has a copy? Thank you.

MR. COMERFORD: Is it all right with Your Honor if we go through the plan first? Is that --

THE COURT: Yeah, let's go through the plan first, please, Mr. Comerford.

MR. COMERFORD: Okay. I've marked every page that has a change but I'm going to try to focus on the more substantive changes, if that's okay?

THE COURT: Yeah, let's do that. Yeah.

MR. COMERFORD: So, that would take me to Page 6 of the redline where we inserted a new definition entitled Contributing Directors and Officers. This goes to what my colleague Mr. Hall was describing earlier where we now have two different paragraphs for the debtor releases. So, we have contributing directors and officers as part of that paragraph where they are receiving the entirety of the

debtor release versus other parties that are getting the debtor release with a carve out.

THE COURT: Okay.

MR. COMERFORD: Page 8, the Definition of the Exculpated Parties. This is negotiated language with the United States Trustee's Office that we reached agreement on. But I will note that we are going to have to revise the plan to address some of what Mr. Hall was discussing earlier in terms of the resolution between the committee and Compeer. We're also going to make a change here which was intended to be made but just was an oversight. At the end here where it says, and F, with respect to the foregoing clauses A and B, each of their respective related parties... That's actually not going to be part of the definition. That's going to come out.

THE COURT: Okay.

MR. COMERFORD: Page 11. This Deletion of Letter of Credit. That's going to go back into the plan as well as part of the resolution reached between the committee and Compeer. Page 12. Again, a new definition, Other Released Parties. This was what we discussed and negotiated with the United States Trustee's Office and goes back to the debtor release changes that we made.

Pages 15 -- Page 15. This really starts on 14, I apologize. So, the Definition of Related Parties. And then

the Definition of Released Parties and Releasing Parties. These changes predominantly were from our discussion with the United States Trustee's Office, and then we also had a few clarifying changes just to fix a couple of typos that were in there.

THE COURT: Okay.

MR. COMERFORD: Page 16. The definition at the bottom is actually going to be reinserted. Similarly, on Page 17, the Workers' Compensation Deductible Funds, that's going to be reinserted into the plan. Page 18. At the bottom, in Section 2.1, this speaks to the -- this is part of the resolution, the global resolution with the creditors committee in terms of how distributions will be made in connection with general unsecured claims. There'll be the one distribution for all -- all general unsecured claims that were filed in the cases. Moving to -- Yeah?

THE COURT: We're introducing substantive consolidation at the 11th hour. Should I have any concerns that creditors haven't had an opportunity to weigh in on the issue of substantive consolidation when the plan initially stated we're not substantively consolidating the debtor's estates?

MR. COMERFORD: I don't think so, Your Honor, because I think it was something that was contemplated in the context of the committee's settlement in terms of how

distributions would be made. And I think that the overall impact from doing this is to the benefit of unsecured creditors, to ensure that they get the highest and best distribution that can be made available to them. And I think, at the end of the day, what this is really doing is just making this streamlined since all of this is being done in connection with establishing a liquidating trust and having a liquidating trustee oversee the pool of money that's being set aside for the benefit of general unsecured creditors.

And so that's ultimately what the impact is going to be, and I think will benefit unsecured creditors. And, obviously, if Mr. Mannal would like to speak to this, I'm obviously happy to step aside for that.

THE COURT: Yeah, sure thing.

MR. MANNAL: Your Honor, Doug Mannal from Dechert on behalf of the unsecured creditors committee. Your Honor, it's substantive consolidation for distribution purposes exclusively. And, as Mr. Comerford in advance of the hearing in his conversations with the one objecting party informed them, that they're better off with the substantive consolidation for distribution purposes. Because the way the settlement with Compeer works is a waiver of a significant $70-plus million deficiency claim. And so what this is premised on is a single distribution for unsecured

creditors.

And had that claim been asserted, the distribution percentages to unsecured creditors being much less. So, I think substantive consolidation for distribution purposes is very appropriate here, as Mr. Comerford was able to convince the one creditor an issue. So, by withdrawing that objection I think it's evidence that this is the best way to proceed.

THE COURT: Thank you.

MR. COMERFORD: Anything else on that, Your Honor?

THE COURT: Nothing else on that. Thank you, Mr. Comerford.

MR. COMERFORD: You're welcome. This will take us to Page 20 and 21 of the redline, which is really just -- it states exactly what we were just talking about in terms of how the distributions will work and states what the range of recoveries will be for general unsecured creditors and a revised claim amount for general unsecured claims, which reflects the settlements that we've reached leading up to confirmation with Strobel and other creditors.

THE COURT: Okay.

MR. COMERFORD: Page 32 of the line. That's non-substantive changes. It's really just addressing when the committee's professionals were put in place. Page 35 of the line. The paragraph entitled Committee Settlement. I think

these changes are, by in large, from the committee just to clarify how the settlements that they've reached are being implemented and the benefit that's being received by general unsecured creditors from those settlements.

I am going to move to Page 48 of the redline. At the top paragraph, it's really -- again, it's restating the point about how distributions will be made in connection with the limited consolidation for purposes of distribution. Page 49 is a deletion with respect to avoidance actions was included in the treatment section and it was taken out that that's a committee comment, I believe.

Page 51 of the redline, Section 9.1. Again, this is just reaffirming what we were just talking about in terms of the consolidation for purposes of distributions by the liquidating trust. Page 60 and 61 of the redline. This is Section 9.10 entitled Distributions by Liquidating Trustee. There was a paragraph that we took out here related to Workers' Compensation. This actually is going to go back into the plan. This is what was being discussed in the 30-45 minutes before the hearing.

THE COURT: Okay.

MR. COMERFORD: And that takes us to Page 69 and 70, which I believe these are the last changes to bring to Your Honor's attention, but they go straight to what we were talking about earlier with respect to the United States

Trustee's discussions with us and how we changed the language in connection with exculpation and the releases by the debtors. I'm happy to discuss that further if you'd like, but otherwise, that was --

THE COURT: Yeah, I had the opportunity to read it and I'm satisfied.

MR. COMERFORD: Okay.

THE COURT: Yeah, thank you.

MR. COMERFORD: So, that's the plan.

THE COURT: Okay.

MR. COMERFORD: Then I'll move to our confirmation order. Do you have that in front of you, Your Honor?

THE COURT: I do.

MR. COMERFORD: Okay. So, on Page 2, we updated a few things in terms of the additional declarations that we filed and that were introduced into evidence earlier in this hearing. I'll try to focus on the more substantive changes. Page 8, there's a paragraph with respect to the plan settlements that have been incorporated really just -- it's language speaking to the reasonableness, the probability of success and the good faith comprises that were reached in connection with implementing them.

Page 10 of the redline. This is language again that speaks to the limited consolidation for distribution purposes. Page 11, Paragraph U, this relates to releases,

exculpation and injunction. This is language that was negotiated with the United States Trustee just to be more specific or artful as to what exactly each of the release provisions is doing and the basis for it.

MS. SARKESSIAN: Your Honor, if I could just put on the record -- Juliet Sarkessian for the U.S. Trustee. This was with -- these changes were made with the idea that if Your Honor ruled in favor of the third party releases. Of course, we don't necessarily agree with the findings that are here.

THE COURT: Yeah, I understand.

MS. SARKESSIAN: Thank you.

THE COURT: Thank you very much, Ms. Sarkessian.

MR. COMERFORD: Yes. We understand that, Your Honor.

THE COURT: Great.

MR. COMERFORD: Page 13, just some language that was deleted in the middle of the page there. That was a comment from the United States Trustee's Office. Page 20, Paragraph 7. This is just additional language that was put in at the committee's request just to reflect what needs to happen in terms of making the plan effective if it is confirmed. Page 21. Again, this is a paragraph that was inserted just with respect to approval of the settlements that are contemplated in connection with the plan.

Page 22. We added a couple of sentences at the committee's request with respect to the establishment of the liquidating trust and Matthew Dundin, who will be the liquidating trustee, and his compensation is set forth I the liquidating trust agreement. And that speaks to approving the terms of the liquidating trust agreement that was filed as a plan supplement, and also the rights and powers that he will have in connection with that agreement.

I'm going to move to Page 25 and 26. This is some clarifying language that we added at the United States Trustee's request, I believe, in terms of any contracts or leases that are rejected in connection with the plan and making sure that such parties receive information on how to file their proof of claim properly.

And then moving to Page 27. This is 27, 28 and 29. This was the United States Trustee's request that since we have the releases and exculpation already set forth in the plan, in order to avoid confusion, since it's already set forth in one place, not to have it in both places. So, we agreed to do that. So, we just have a restatement that they're -- where they're contained in the plan and that they're approved.

And that would take us to Page 30, which is a paragraph, Paragraph 27, that speaks to the dissolution of the committee and the limited go-forward purposes that they

would have post-effective date. Page 32. There was a Paragraph 32, Payment of Statutory Fees, that the United States Trustee asked us to take out because it was either duplicative or slightly inconsistent with what was already in the plan. So, we agreed to take that out and just rely on what's in the plan.

And then moving to Page 33. This is -- in Paragraph 36, this is some language that we received from the Texas comptroller with respect to some -- an issue they had to ensure that the tax claim that they filed, which is I think approximately $2,600, is addressed pursuant to the plan and, if not, what they can do. And the last page of the redline, Page 37, is a paragraph added -- in connection with authorizing the debtor to consummate the plan subject to the satisfaction of the conditions preceding in the plan.

THE COURT: Okay, thank you.

MR. COMERFORD: That's it for those two documents, Your Honor.

THE COURT: Okay.

MR. COMERFORD: Absent any questions, that's all I have.

THE COURT: I think Mr. Hall has a suggestion for you.

MR. COMERFORD: Ah, yes. So, I still am done but one other thing we thought would be helpful is to have the

creditors committee walk through a few changes that they negotiated with the United States Trustee on the liquidating trust agreement.

THE COURT: Sure.

MR. COMERFORD: This all happened since we filed it. Thank you.

MR. MURLEY: Good afternoon, Your Honor. Luke Murley of Saul Ewing, counsel to the committee. I have a redline of the ADS file, if I can approach, Your Honor?

THE COURT: Yes, please. Thank you.

MR. MURLEY: Tabbed with our two changes.

THE COURT: You got it. Thank you very much, Mr. Murley.

MR. MURLEY: Your Honor, the marked version you're looking at shows changes that we agreed to with the U.S. Trustee shown against the ADS file version and they both related to the limitation of liability for a committee -- the oversight committee member as it relates to exculpation. In 4.6, the U.S. Trustee asked us to delete the first paragraph, which we agreed to. And in the second sentence, Your Honor, the qualification for not being sued in taking action in connection with the plan -- the agreement, is that the member is in good faith.

THE COURT: Yes.

MR. MURLEY: The next change, Your Honor, is in

the next tab on the Standard of Care in 7.1, and there we accepted the U.S. Trustee's language wholesale.

THE COURT: Okay.

MR. MURLEY: So, with that, Your Honor, those changes the U.S. Trustee and the committee are resolved as to the form of the liquidating trust agreement.

THE COURT: Very good. Thank you.

MR. MURLEY: Thank you.

MS. SARKESSIAN: Your Honor, could I just make a short statement on the record?

THE COURT: Of course you can.

MS. SARKESSIAN: Again, for the record, Juliet Sarkessian on behalf of the U.S. Trustee. We certainly appreciate the committee making the changes we requested to the litigation trust agreement. I stand to make the point that the first time the litigation trust agreement -- am I saying it right? Is it litigation trust or liquidating trust?

MR. MURLEY: Liquidating.

MS. SARKESSIAN: Liquidating, liquidating trust agreement was filed was October the 2nd, earlier this week, which is after the voting deadline. As Your Honor is aware, local rules require a plan supplement to be filed seven days before the voting deadline. Just filed. It doesn't even get served on the creditors that are voting on the plan, but

at least the notice tells them hopefully to look for the plan supplement.

Honestly, from the U.S. Trustee's point, they should be attached to the plan. But if it's going to be in the plan supplement, it's got to be in the plan supplement seven days before. They also did not identify who the liquidating trustee was. But this is an important document and getting it after the voting deadline, it's obviously not available for anybody to look at in connection with the voting. So, that is why I stand up to make that statement. We really, really encourage parties to file a complete plan supplement, at least with all the major documents, from the date that it has to be filed under the rules.

THE COURT: You know, without saying too much about it, one thing that I'm learning is that attention to deadlines is -- it's scattered, in general. And, you know, particularly with a plan where you're asking creditors to effectively enter into a contract, they need the information. I appreciate you very much rising to point out the issue. But just in general, we need people to do a little better with observing these sorts of deadlines. They're very, very important.

MS. SARKESSIAN: Something we absolutely agree on. Thank you.

THE COURT: Yeah. Okay.

MR. HALL: Your Honor, if I may? This is not something that was in the plan. It is something that we will figure out whether it goes in the plan or some other document. But I just wanted to put on the record -- and I think Mr. Mannal will be able to confirm -- that this is -- that I've got it right. But in connection with one of the changes that Mr. Comerford took you through at Section 9.10, Page 60 of the plan redline, it was the language relating to holding Workers' Compensation money.

THE COURT: Yes.

MR. HALL: Okay. That was an issue I think that Mr. Comerford mentioned was the last issue that we were discussing in resolving just before the hearing commenced and why we had asked for the additional 15 minutes. Essentially, what happened there is there was a disagreement between the committee and Compeer as to an aspect of the stipulation that the Court had entered into in August, and the way that we determined to resolve that was to yield to Compeer's interpretation of the stipulation and reinsert the language in 9.10.

But the consequence of that would be that the committee and its constituent creditors would be out approximately $200,000 as a result. And the way we're going to solve for that is to defer $200,000 of professional fees and that's going to be shared ratably 50K each by Dechert,

Katten, Potter Anderson and PWC. And we'll defer that pending the outcome of what happens with that Workers' Comp holdback that is reflected in 9.10. And if it works out that that money gets completely consumed, those $200,000 will go to the benefit of the general unsecured creditors and will never be collected by the professionals. If it turns out that less than $384,000 of that money is consumed, then the creditors would have the benefit of the $200,000 from -- if you will, from 9.10, and the professionals will be paid their fees.

THE COURT: Okay.

MR. HALL: But I just wanted that to be clear for the record. It's not something that's in any document anywhere. It's not on the docket and what have you. It literally happened within an hour or so before the hearing. And subject to Mr. Manal's confirmation, I believe I've articulated it correctly.

Oh, and I would say one more thing. That that $200,000 in deferred fees is for the benefit of general unsecured creditors, and Compeer has agreed to both that and has acknowledged that under the budget, as we have it today, they will be contributing the full amount of their -- I think it's called the guaranteed amount in the stipulation but it's the full amount of the $750,000 holdback.

THE COURT: Okay, thank you.

MR. MANNAL: Your Honor, Doug Mannal from Dechert on behalf of the committee. Your Honor, I just want to take this time to maybe take a step backwards. And as Mr. Hall at the outset of the hearing said, the committee does not oppose entry of the confirmation order today. This was not an easy decision. This is a very difficult case. A difficult case for all stakeholders. Compeer, the secured creditor here is getting a 30-cent recovery. I think they've lost upwards of $70 million in their investment.

But it's particularly difficult for unsecured creditors and a lot of the smaller creditors that exist in this case that we're working hard to obtain recoveries for and increase their recoveries. When we started this case, I think they were set to get about 2 cents, 2 or 3 cents. And we've increased that to an 11-cent, an 11-14 cent recovery, as advertised in the disclosure statement. That wasn't easy. It's comprised of a lot of different buckets. It's $1.9 million from remaining assets, it's a $750,000 contribution by Compeer that's currently being held in escrow, and it's a settlement with insiders. And that equates to a little over $3 million for distribution to unsecured creditors that will go to the trust and be distributed.

I do want to just confirm, however, that one of the key ingredients to that settlement is the $750,000

contribution by Compeer that's being held in escrow. There was a dispute, as Mr. Hall said, this morning about cash that would otherwise be available for unsecured creditors. We have agreed to put back the language in the plan that the stipulation does not supersede that language in the plan. But with the agreement that that 750 is available.

And, as Mr. Hall said, the fourth way we're going to get back to the $3.15 million that was agreed to on Friday is by the professionals who ranted it for compensation. So, I just that Compeer confirm on the record that that $750,000 is going to be released into escrow for the benefit of unsecured creditors. Thank you, Your Honor.

THE COURT: Thank you.

MR. GLASNOVICH: Good afternoon, Your Honor. Drew Glasnovich from Stinson, here on behalf of Compeer Financial.

THE COURT: It's good to see you, Mr. Glasnovich.

MR. GLASNOVICH: Good to see you as well.

THE COURT: Thank you.

MR. GLASNOVICH: This case has been really hard fought and the deals that we have have been very complicated, and I appreciate the parties this morning coming together to make sure that we can move forward today. I did confirm with Mr. Hall in writing and copied the committee on Compeer's agreement that the way the budget

stands today, and that budget I think has been circulated to the parties, Compeer acknowledges that under that budget it will be providing the full $750,000 that it had agreed to.

If Your Honor recalls, that number could go one way or the other depending on certain budget outcomes. We understand based on the current budget that that will require Compeer to put in the full 750. That said, the language in I think it's 910 that was taken out this morning will go back in, and the Work Comp fund language will go back in. And we appreciate the professionals putting in the $200,000 to kind of make that work for everybody.

THE COURT: Thank you. Thank you. Yeah, I appreciate the comments from the committee and from Compeer. There has been a lot of pain in this case and I wouldn't want to forget about the employees. I understand that the job losses were in excess of a thousand employees. But I thank the -- I want to recognize the efforts of everybody involved to increase the distribution to creditors and the sacrifices that some of the parties are making. Is the argument closed on the plan?

MR. HALL: Your Honor, yes, the debtors have nothing further.

THE COURT: Okay. And does the U.S. Trustee have anything further?

MS. SARKESSIAN: No, Your Honor.

THE COURT: Okay. I want to take a few moments to gather my notes and why don't we come back on the record at 1:15, unless the parties would like a longer break to go to lunch or anything of that sort.

MR. HALL: From our perspective, Your Honor, we defer the Court.

THE COURT: Yeah, okay. Well, let's push it through then. We'll recess until 1:15.

(Recess)

THE COURT: Okay, I'm prepared to rule on the plan. I want to start by noting that I appreciate the work of the parties and the cooperation that went into it to narrow the issues and come to resolutions on many important issues. And I note that when the plan was solicited, the committee had a statement that said that they urged the creditors to vote against the plan. And I think it's really significant that the committee is here today supporting the plan. And through the work of the parties, the projected recovers to unsecured creditors have increased meaningfully. The projections have increased meaningfully. So, I appreciate that.

I'm going to grant final approval of the disclosure statement, and I am going to confirm the fourth-amended plan. The opt out versus opt in issue and the question of what constitutes consent are questions that, as

we know, are not uncontroversial. But, in my view, if a party receives notice of proposed releases and doesn't object, that party has consented to the releases. As in many other respects, when it comes to bankruptcy, parties are required to be vigilant and defend their rights, and such is the case here. In this case, I find that the opt out, it was conspicuous and some creditors did opt out, which evidences to me that the procedures were effective.

The UST raises a number of concerns that I take very seriously and I'm grateful for the outstanding argument from the UST and appreciate the positions that the office takes. The UST raises concerns about the possibility of mail errors preventing parties from receiving notice. But I note that the federal rules of bankruptcy procedure and civil procedure call for mail notice, and there is a rebuttal presumption of receipt when a piece of mail is sent to an addressee. And I think it's the system that we have and it's the one that we have to live with.

As for unimpaired creditors, the evidence before me shows that they received notice identifying the release provisions of the plan, directing them on how to receive copies of the full plan if they wished, free of cost, and identified procedures for objecting to being a releasing party. And I find this to be adequate and also find that any unimpaired creditor who received such notice and did not

object has consented to the release that they are granting.

I find the scope of the third party releases to generally be appropriate but I raise an issue about third party releases only extending to unknown claims, and I believe it should extend to known claims as well.

Also, to the extent there are parties receiving releases that are, in effect, illusory because they already benefit from exculpation, or in the case of a liquidating trustee, there can be no pre-effective date claims to release, the drafting may be overzealous. And I won't fault anybody for that, but there is no harm.

So, on those grounds, I am confirming the plan. There is the one revision I identified and I think there may be others coming, but I would ask the parties to submit the -- well, to file a further amended plan if that's what we're doing and also to submit the proposed form of order as revised under certification of counsel so that it appears on the docket. And I have had a chance to review it and I will enter the order. But, again, I do want to emphasize my appreciation to the Office of the United States Trustee for their argument. It is a very important issue and one that I take very, very seriously. And I think it's my first time ruling on the issue.

MR. HALL: Your Honor, if I may, just to make sure I understand? We will add known in addition to unknown in

the third party releases. Are we to alter any of the parties that are included in the third party releases?

THE COURT: No.

MR. HALL: Thank you, Your Honor. Appreciate it.

THE COURT: Okay. Is there anything else for today?

MS. GOOD: No, Your Honor, nothing else for today. Thank you for your ruling. We will incorporate those changes, file the further amended plan and the confirmation order under certification of counsel and have that (indiscernible)...

THE COURT: Okay, thank you. I appreciate the extremely well-briefed and argued issues that were before me today. It's great. Very helpful to the Court. So, I appreciate it all. And with that, I wish everybody a good day and we are adjourned.

MS. GOOD: Thank you, Your Honor.

MR. HALL: Thank you, Your Honor.

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C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing transcript is a true and accurate record of the proceedings.

Sonya Ledanski Hyde

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